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No. 97-471

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1997

KANSAS PUBLIC EMPLOYEES
RETIREMENT SYSTEM,

Petitioner,

v.

BLACKWELL, SANDERS, MATHENY, WEARY
& LOMBARDI, L.C., A LAW PARTNERSHIP, *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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***Other Authority*:**

18 Charles Alan Wright, Arthur R. Miller and Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction* (1981) 9

REPLY BRIEF FOR PETITIONER

The fusillade of misleading and irrelevant points launched by respondents in their four briefs in opposition — covering a total of 87 pages — cannot, despite respondents' best efforts, obscure the two independent grounds for review set out in the petition for certiorari.

First, the error committed by the Eighth Circuit in failing to certify, or at least stay, a decision with respect to the controlling issue of Kansas law warrants plenary review because it constitutes a violation of basic principles of cooperative judicial federalism.

Second, even if this Court is unwilling to grant plenary review, the error below — an error that has subjected the parties and this Court to the unnecessary burden of the certiorari process — can be fully remedied simply by resort to this Court's longstanding practice in like circumstances of vacating the court of appeals' decision and remanding for reconsideration in light of the intervening decision of a state supreme court on a controlling point of law.

1. With respect to the first question presented (Pet. 12-17), respondents' submissions are more notable for what they do not say than what they do say. Respondents do not contest the importance that has long been placed by this Court, in its encouragement of cooperative judicial federalism, on the exercise of "sound discretion" in deciding whether to use available certification procedures to resolve uncertain issues of state law. *See* Pet. 13-14; *Lehman Bros. v. Schein*, 416 U.S. 396, 391 (1974).[1] The requirement of "sound discretion" must necessarily carry *some* constraining effect — "there is obviously a difference between *principled* and *limitless* discretion," Pet. 14, even within the rule that mere "doubt as to local law" does not, in general, make certification "obligatory." *Lehman*, 416 U.S. at 390-91.[2]

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[1] Indeed, one respondent affirmatively endorses this point. *See* Brief in Opposition of Respondent Shook, Hardy & Bacon ("Shook Hardy Opp.") at 17-19.

[2] Amazingly, two respondents actually argue (unsupported by any authority) that "[c]ertification of state law questions should *never* be mandatory." Brief in Opposition of Respondents Dreiseszun, Ozar and the Estate of Frank S. Morgan ("Dreiseszun Opp.") at 12 (emphasis added). Other respondents invoke the concurring opinion in *Lehman* of then-Justice (now Chief Justice) Rehnquist (*see* Brief in Opposition of Respondents KPMG Peat Marwick LLP and Robert W.L. Spence ("KPMG Opp.") at 14; Shook Hardy Opp. 18), but ignore the key language

Nor do respondents make any serious effort to dispute the analysis of a number of leading jurists, including Judges Becker, Easterbrook, Sloviter, and Calabresi, pointing to the strong need for certification of uncertain state-law issues to prevent grave errors with respect to the content of state law and to eliminate the real danger that, absent the use of certification in such cases, many important issues of state law will be funneled into the federal system as a result of forum-shopping. Pet. 14-16. Finally, respondents do not dispute that, in the more than two decades that have passed since this Court's 1974 decision in *Lehman Bros.*, clear differences have emerged in the test used for certification by the lower courts. Pet. 16 & n.22.

Thus, the first question presented, allowing further explication of the role of certification as an aspect of judicial federalism, is plainly an appropriate subject for plenary review. Further, the rule or guideline that we have proposed, defining one instance — admittedly narrow — in which a federal court categorically exceeds its discretion by refusing to certify, is well crafted to an agenda of cautious further explication. If this Court's decision in *Lehman* has any binding force, it must mean that when: (1) a federal court is hearing the claims of *a State itself*, involving important state interests, and (2) those claims turn on an uncertain issue of *that State's own law*, and (3) the issue is one on which the State's supreme court has already granted discretionary review, then (4) the federal court must certify the issue (or, at minimum, temporarily stay its hand).

Respondents seek to avoid the force of this argument by suggesting that this case is a poor vehicle for review and, in particular, that the proposed rule or guideline would not benefit KPERS. Here, respondents advance four main arguments. All are without merit.

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of that concurrence quoted in our petition, Pet. 14 n.19, which appears consistent with our narrow approach. Further, respondents ignore a key reason why, in the *Lehman* concurrence, the Chief Justice counseled caution: *Lehman* was "the first time" that the Court "expressed its view as to the use of certification procedures by the federal courts," 416 U.S. at 395, leading him to conclude that "a sensible respect for the experience and competence of the various integral parts of the federal judicial system suggests that we go slowly" with respect to the use of certification procedures. *Id.* at 393. The experience with certification over the 23 years since *Lehman* has laid the groundwork for taking further steps — especially in light of divisions that currently exist in the lower courts, and in light of recent expressions of concern by leading jurists. See p. 2, *infra*.

First, respondents claim that it is too late for KPERS to benefit from a ruling on the first question presented because "the Kansas Supreme Court has already rendered its decision." KPMG Opp. 14. Thus, we are told, on remand "there could be no call for the Eighth Circuit to certify any question to the Kansas Supreme Court or to stay its hand pending a decision by that court." *Id.* The answer to KPMG's argument is obvious: if this Court grants plenary review and holds that the Eighth Circuit erred in not *earlier* deferring to the Kansas Supreme Court on a controlling issue of state law, that error can be fully rectified by requiring the Eighth Circuit to *now* defer to the Kansas Supreme Court's already announced decision — i.e., by following that decision on remand.[3]

Second, respondents suggest that KPERS somehow waived its right to a ruling from the Eighth Circuit on the central issue of the nature of KPERS' investment functions (governmental or proprietary), by not appealing it sooner. *See* KPMG Opp. 15 & n.11; Brief of Respondent Blackwell Sanders Matheny Weary & Lombardi, L.L.P., in Opposition ("Blackwell Sanders Opp.") at 14-15. But as our petition established, KPERS appealed the district court's ruling on this issue as soon as a final judgment was entered in the case. *See* Pet 6 n.8. That a few *respondents* had earlier pursued an *interlocutory* appeal contesting some statute-of-limitations rulings of the district court premised on KPERS' activities being proprietary in nature, did not obligate KPERS to bring its *own* motion for interlocutory review or to otherwise raise the issue — especially since the district court had concluded that all of KPERS' claims *were* timely (under the Kansas 10-year special limitations statute for claims brought by KPERS).[4]

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[3] Despite some efforts by respondents to obfuscate the point, the Kansas Supreme Court decision that KPERS' lawsuits relate to a governmental and not a proprietary function was the key to its determination that the Eighth Circuit had erred in applying the Kansas two- and three-year limitations periods. *See* Pet. 10-11; *KPERS v. Reimer & Koger Assocs., Inc.*, 941 P.2d 1321, 1328 (Kan. 1997) ("fundamental issue we must decide"); *id.* at 1338 ("this important issue was not even mentioned" in earlier Eighth Circuit statute-of-limitations decision); *id.* at 1341 (Eighth Circuit's recent decision "failed to recognize" key distinction in Kansas law); *id.* at 1343 (Eighth Circuit's recent decision was "incorrectly decided" because KPERS' actions "are all governmental in character" within meaning of Kansas law).

[4] Indeed, as those respondents made clear from the outset, that interlocutory appeal focused on a choice-of-law issue. *See* Petition for Permission to Appeal of Estate of Frank Morgan, et al. (No. 94-8088), July 14, 1994, at 1

Third, respondents assert that, at the time the Eighth Circuit ruled, *no* uncertainty existed under Kansas law on the governmental/proprietary issue. *See* KPMG Opp. 15-16; Shook Hardy Opp. 20-22; Blackwell Sanders Opp. 11 & n.9. But respondents ignore the fact that *they themselves* admitted in filings with the Kansas courts, in which they sought review on this very issue, that the issue was extremely uncertain. *See* Pet. 8-9 (quoting Reply Brief of Appellant at 2). For example, although respondent Blackwell Sanders asserts in this Court that "it is misleading at best for KPERS to characterize the issue . . . as an issue of 'first impression'" (Backwell Sanders Opp. 11), Blackwell Sanders argued in the Kansas courts that there were "substantial differences of opinion" on the issue.[5] Likewise, another group of respondents told the Kansas courts that "[t]here are *no cases* directly considering whether KPERS is exercising a governmental or a proprietary function when investing and administering fund assets."[6]

In any event, the fact that the Kansas Supreme Court *agreed* with these respondents, and with other defendants in the Kansas courts, that the issue was uncertain enough to merit immediate discretionary and plenary review (before the Eighth Circuit took up the present case) demonstrates its unsettled nature when the Eighth Circuit ruled.

Fourth and finally, respondents make various assertions that even if plenary review would otherwise be warranted on the first question presented, it should be denied here because KPERS supposedly is guilty of "engag[ing] in improper litigation tactics for the very purpose of delaying entry of final judgment in federal court in order

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("Because of the removal to a different states, the primary question in this petition is whether to apply the Missouri limitations law . . . or Kansas limitations law"). Just one paragraph of the thirteen-page petition discussed the substance of Kansas limitations law. *Id.* at 9-10. The district court's governmental/proprietary ruling under Kansas law was never addressed at any point during that interlocutory appeal.

On the basis of KPERS' showing in the instant case below that it was not required in respondents' earlier interlocutory appeal to present all alternative arguments with respect to the substance of Kansas limitations law (*see* Reply Brief of Appellant (No. 96-3680), Jan. 28, 1997, at 7-9), the Eighth Circuit went on to decide the governmental/proprietary issue, declining to rely on the "law of the case" doctrine to avoid the merits, and thereby demonstrating the irrelevance of respondents' point. *See* Pet. App. 13a-15a.

[5] Reply Brief of Appellant, Supp. App. at 6.

[6] *Id.*, Supp. App. at 4 (emphasis added) (Reimer & Koger respondents).

to create the apparent conflict which petitioner now contends required certification." KPMG Opp. 17. In particular, respondents accuse KPERS of "embark[ing] on a series of abusive tactics intended to delay dismissal while it set up the limitations question in the other state court cases it had filed." Dreiseszun Opp. 6; *see also id.* at 7.

This claim makes no sense. To be sure, given that this case was removed to Missouri federal court only as a result of an unusual forum-shopping tactic pursued by respondents, who brought meritless claims against the RTC, and given that the RTC stated on the record that, once dismissed from the suit, it had no interest in the case's remaining in federal court, KPERS sought to return the litigation to the Kansas state courts, where *all the other consolidated cases involving its investments are pending*. *See* Pet. 4-5 n.6.[7] The State of Kansas obviously had every reason, and every right, to attempt to consolidate all the cases involving KPERS' investments in its own courts. When these efforts failed, KPERS sought to obtain certification to the Kansas Supreme Court of the Kansas state-law issue.

Thus, the definitive answer to respondents' charge is that any delay resulting from various motions and appeals could not have been part of a scheme by KPERS to "set up" a countervailing Kansas Supreme Court decision on the limitations issue. KPERS *won* in the Kansas trial court on that issue. The issue reached the Kansas Supreme Court only because *respondents*, and other defendants in the state court litigation, sought review. The pendency of that issue

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[7] KPMG accuses us of making a "grossly misleading" misrepresentation of the RTC's position on this point. KPMG Opp. 7 n.4. KPMG provides no relevant explanation of the basis for this accusation; the balance of this footnote simply observes that the RTC monitored the case for a time after the claims against it were dismissed as meritless, but fails to take account of the RTC's explicit assumption that the case would be returned to state court. So that this Court can evaluate KPMG's accusation for itself, we have appended the entire passage from the hearing transcript in which the RTC expressed its views. See Appendix hereto.

In a related vein, KPMG intimates that KPERS sought to have this case heard in the Kansas state courts because the judges there are biased, as a win by KPERS supposedly might increase their pensions. KPMG Opp. 7-8 n.6. But KPERS administers *defined benefit* plans, so that the effect of a KPERS' loss and consequent shortfall would be a slight increase in the tax burden for all Kansas citizens, including federal judges residing in Kansas. *See* Brief of Appellants at 33-34. In addition, the acknowledged history of the Kansas state court litigation demonstrates the willingness of the Kansas judiciary to act on claims of judicial bias. *See* KPMG Opp. 6 n.3; Blackwell Sanders Opp. 7-8 n.7.

before the Kansas Supreme Court — which, we contend, triggered the obligation to certify, or at least to wait — was not the endgame of some nefarious delay stratagem by KPERS. Respondents' assertion of an "unclean hands" theory is entirely beyond the pale.[8]

2. We explained in the petition that, if this Court were not inclined to grant plenary review in this case in order to provide guidance on issues of judicial federalism, then it should at the very least grant the petition, vacate the judgment, and remand to the Eighth Circuit for further consideration in light of the Kansas Supreme Court's intervening decision. *See* Pet. 18-21. As with the first question presented, here again respondents do not dispute the essential points, instead relying on an effort to obfuscate the basis for a GVR order by reference to aspects of the record that are irrelevant here, and are appropriate only for consideration by the Eighth Circuit on remand.

The most striking aspect of the oppositions lies with respondents' failure to confront the decisions handed down by this Court more than half a century ago in *Vandenbark v. Owen-Illinois Glass Co.*, 311 U.S. 538 (1941), and *Huddleston v. Dwyer*, 322 US. 232 (1944). *See* Pet. 19 & n.25. KPERS heavily emphasized these cases in its briefs filed with the Eighth Circuit urging rehearing.[9] Under *Vandenbark*, the Eighth Circuit was obligated to conform its decision to an intervening decision of the Kansas Supreme Court, and this duty persisted "until such time as [the federal] case is no longer *sub judice*." 311 U.S. at 543. As we emphasized to the Eighth Circuit, when a lower federal court refuses even to *consider* the intervening state court decision, this Court will grant, vacate, and remand, to ensure that the court of appeals discharges its duty under *Vanderbark*. *See, e.g.*, *Huddleston*; *National Union Fire Ins. Co. v. American Medical International, Inc.*, 116 S. Ct. 510 (1995); *Exxon Co., U.S.A. v. Banque de Paris et des Pays-Bas*, 488 U.S. 920 (1988).

Despite KPERS' careful briefing below of this issue, the Eighth Circuit denied its initial petition for rehearing, and refused even to

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[8] It should also be noted — with respect to respondents' repeated references to the prior certiorari petitions filed by KPERS in this proceeding — that none of the issues presented in this petition has been presented to this Court before.

[9] *See* Petition for Rehearing (No. 96-3680), May 23, 1997, at 5-6; Second Petition for Rehearing, July 16, 1997, at 6, 8-9.

consider KPERS' second petition for rehearing, which was designed to spare the parties and this Court the burden of the certiorari process. In so doing, the Eighth Circuit has placed this case on all fours with the facts in *Huddleston*, *Exxon* and *National Union*. In all three cases — and in this case — a federal court of appeals in a case arising under state law entered judgment against the petitioner based on an interpretation of state law.[10] In each case, a timely petition for rehearing was denied. In each case, the pertinent state court then issued a decision casting doubt on the federal court's construction of state law. In each case, the petitioner then reapplied to the court of appeals, seeking leave to file a second petition for rehearing to bring the new state court decision to the attention of the court. In each case, leave was denied. In *Huddleston*, *Exxon* and *National Union*, this Court then granted a petition for certiorari, vacated the judgment below, and remanded for reconsideration in light of the intervening state court decision. It should follow the same course here.

Respondents have no answer to the controlling significance of this Court's *Huddleston* line of cases. Respondents, instead, argue that because the court of appeals had the *opportunity* to grant the second petition for rehearing, but *refused* to do so, there is no further basis for relief. *See* KPMG Opp. 18; Shook Hardy Opp. 25-26. Respondents have it precisely backwards. As *Huddleston*, *Exxon* and *National Union* make clear, it is just such a refusal by a court of appeals even to *reconsider* its judgment, when asked to do so following an intervening, controlling decision of state law, that will lead this Court to grant certiorari and remand to ensure that the court of appeals adheres to the clear dictates of *Vandenbark*.[11]

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[10] One respondent makes the confusing assertion that the temporary involvement of the RTC in this case, through respondents' assertion of meritless third-party claims against the RTC, somehow "converted this case into a federal-question case" under an admittedly now-defunct statute. KPMG Opp. 16. Whatever the point of this assertion, it is clear that *all* of the substantive claims asserted by KPERS against *all* respondents arise only under Kansas law and remain in federal court only on a strained and dubious theory of supplemental jurisdiction.

[11] It bears emphasis that the Eighth Circuit has not considered and denied KPERS' second petition for rehearing. Rather, the Eighth Circuit has simply denied KPERS leave even to *file* that petition. *See* Appendix to Dreiseszun Opp. It is also worth noting that in their oppositions to KPERS' motion for leave to file a second

As anticipated in the petition, *see* Pet. 21 n.27, respondents, focusing heavily on what they predict will happen if this Court enters a GVR order and returns the case to the Eighth Circuit, argue that a remand would not affect the ultimate outcome. But respondents do not, and cannot, effectively answer the four independent reasons set forth in the petition, explaining why these arguments are without merit.[12] Even more fundamentally, respondents ask the wrong

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petition for rehearing, respondents argued: (1) that the Eighth Circuit "lacks jurisdiction to entertain KPERS' motion for rehearing" unless KPERS could meet "the demanding standards for recalling this Court's mandate," Opposition of Shook Hardy to Motion of KPERS for Leave to File a Second Petition Out of Time and to Recall Mandate, July 26, 1997, at 2-3; and (2) that if it did grant the motion, the Eighth Circuit should permit respondents to file briefs on possible alternative grounds for affirmance. Response of Appellees Estate of Frank Morgan, et al.,July 25, 1997, at 1, 4; Response of Reimer & Koger Associates, Inc., et al., July 28, 1997, at 1.

[12] First, although respondents cite scraps of the lower court decisions designed to *suggest* that the courts below ruled, in the alternative, that some of KPERS' claims failed the Missouri five-year statute of limitations, *not a single line of either decision below addresses the Missouri limitations period.* See also note 11, *supra*. It would be highly unusual for this Court to address it in the first instance. Further, granting relief to KPERS and remanding the case would impose no additional burden on the Eighth Circuit, which is currently considering a later-filed appeal by KPERS (No. 97-1879) involving a final co-defendant in this very case, which — given the Kansas Supreme Court's intervening decision — will require the Eighth Circuit to address the Missouri statute-of-limitations issues.

Second, in light of the Kansas Supreme Court's intervening decision, KPERS now has "new grounds on which to attack the Eighth Circuit's earlier hypothetical rulings with regard to the possible applicability of the Missouri five-year statute of limitations." Pet. 21 n.27. As we argued to the Eighth Circuit below, the fact that it is now clear that KPERS is *the State of Kansas*, acting in a *governmental* capacity with respect to its investments, suggests that the State of Missouri, out of a concern for comity, would not apply a five-year general statute of limitations to its claims, but would apply *no* statute of limitations under Missouri law, given KPERS' sovereign status. *See* Brief of Appellant (No. 96-3680), Dec. 13, 1996, at 43-44. Respondents fail to address this argument.

Third, KPERS has ample basis for demonstrating that, even if the five-year period applies, KPERS would meet it on this record. Notably, respondents assume, in arguing that the contrary is crystal clear, that KPERS' claims all accrued no later than December 21, 1986. But it is undisputed that KPERS filed suit against all but two respondents (Shook Hardy and Blackwell Sanders) *within the five-year limitations period running from this date provided by Missouri law. See* Reply Brief

question in focusing on arguments that would be involved on remand. In *Huddleston*, this Court vacated and remanded because "[t]he second opinion of the Oklahoma Supreme Court * * * has at least raised such doubt as to the applicable Oklahoma law as to require its reexamination in the light of that opinion * * * before pronouncement of a final judgment in the case by the federal courts." 322 U.S. at 236-37. As the Court explained, "[t]hat doubt is not to be resolved in the first instance by this Court," but instead by the lower federal court on remand. *Id.* at 237-38. Under *Vandenbark* and *Huddleston*, that doubt requires the Eighth Circuit to reconsider its judgment. The Eighth Circuit's refusal even to entertain a petition for rehearing should lead to the same result here as in *Huddleston*, *Exxon* and *National Union*.

Of course, even if KPERS had never sought leave to file a second petition for rehearing on the basis of the *Huddleston* line of cases — that is, even if KPERS raised the intervening Kansas Supreme Court decision for the first time on certiorari — a GVR order would be warranted under this Court's longstanding practice. *See* Pet. 18-21. Here, apart from the unwarranted and improper assertion that the outcome would not change on remand, respondents have no ground for resisting the relief sought. In particular, respondents have no answer to Justice Scalia's point with respect to comity: given that this Court routinely issues GVR orders purely to ensure conformity with *this Court's intervening and controlling decisions* on federal law, there is plainly no basis to treat less respectfully *a state supreme court's* intervening and controlling decisions on state law. Pet. 20.[13]

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of Appellant at 4 n.6. And even as to the other respondents, this timetable is hardly controlling; e.g., the Eighth Circuit below, in explaining its decision, assumed at one point that "the statute began to run on . . . December 7, 1987." App. 21a.

Fourth and finally, as one respondent acknowledges (although pejoratively), *see* Dreiseszun Opp. 16-17, it is far from clear that a dismissal under the Missouri statute of limitations would have the same legal consequences as the Eighth Circuit's current dismissal under the Kansas statute of limitations. *See, e.g.*, 18 Charles Alan Wright, Arthur R. Miller and Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction* § 4441, at 366, 368 (1981) (referring to traditional rule that a "dismissal on limitations grounds merely bars the remedy in the first system of courts, and leaves a second system of courts free to grant a remedy that is not barred by its own rules of limitations").

[13] Given this Court's frequent practice of issuing GVR orders in cases bearing on the proper statutes of limitations for federal claims, this point alone is

3. The questions presented go to the heart of the proper role of federal courts in applying state law. Here the Eighth Circuit, ignoring the parallel, already briefed appeal in the Kansas Supreme Court, rushed to decide an uncertain issue of Kansas law that has dramatic consequences for the public fisc of the State of Kansas. While the case was still *sub judice*, the Kansas Supreme Court unanimously ruled that the Eighth Circuit had erroneously decided the issue. Rather than conform its judgment to the Kansas Supreme Court's intervening and controlling decision on Kansas law, the Eighth Circuit refused even to permit the *filing* of a second petition for rehearing designed to call its attention to that state court ruling. The Eighth Circuit has misconceived its role in cases involving important state interests and raising unresolved questions of state law,[14] and this Court should grant the petition to reaffirm and clarify that role.

CONCLUSION

The petition for a writ of certiorari should be granted.

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decisive. *See, e.g.*, 490 U.S. 1087-88 (1989) (issuing GVR orders in five cases in light of *Hardin v. Straub*, 490 U.S. 536 (1989)); 488 U.S. 1036, 489 U.S. 1002, 493 U.S. 929 (1989) (issuing GVR orders in three cases in light of *Owens v. Okure*, 488 U.S. 235 (1989)); 483 U.S. 1015, 484 U.S. 806 (1987) (issuing GVR orders in two cases in light of *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987)); 483 U.S. 1015 (1987) (issuing GVR order in light of *Agency Holding Co. v. Malley-Duff & Assocs.*, 483 U.S. 143 (1987)); 471 U.S. 288, 1051 (1985) (issuing GVR orders in three cases in light of *Wilson v. Garcia*, 471 U.S. 261 (1985)).

[14] The refusal of the Eighth Circuit to stay its hand despite being repeatedly informed, from the outset of the appeal, that the dispositive issue of Kansas law was pending, fully briefed, before the Kansas Supreme Court, *see* Pet. 8-11, stands in stunning contrast to this Court's order to the Tenth Circuit in *Kaiser Steel Corp. v. W. S. Ranch Co.*, 391 U.S. 593 (1968). There, this Court ruled that the Tenth Circuit "erred in refusing to stay its hand" until "the state law issues could be settled in a declaratory judgment suit then pending in state courts," *id.* at 594, even though: (1) the state-court declaratory judgment suit was the creation of the losing federal litigant, Kaiser Steel; (2) only a private party, not a sovereign State, was adversely affected; (3) Kaiser Steel filed the state-court declaratory judgment suit eighteen days *after* losing in the Tenth Circuit, and only then asked the Tenth Circuit to stay its hand; and (4) as a result of this Court's order, the Tenth Circuit was forced to hold the case on its docket for two years. *See W.S. Ranch Co. v. Kaiser Steel Corp.*, 388 F.2d 257, 262 (10th Cir. 1967), *rev'd*, 391 U.S. 593 (1968); *Kaiser Steel Corp. v. W.S. Ranch Co.*, 467 P.2d 986 (N.M. 1970).

Respectfully submitted.

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December 2, 1997

SUPPLEMENTAL APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM, *Plaintiff,*	)	
v.	)	
REIMER & KOGER ASSOCIATES, INC., A KANSAS CORPORATION, *et al.*, *Defendants.*	)	No. 92-0922-CV-W-9
FRANK MORGAN, et al., *Defendants and Third-Party Plaintiffs,*	)	Filed Oct. 2, 1995
v.	)	
RESOLUTION TRUST CORPORATION, *Third-Party Defendant.*	)	

TRANSCRIPT OF PROCEEDINGS

February 11, 1993

* * * *

MR. COLLINS: Your Honor, I'm Timothy Collins on behalf of the Resolution Trust Corporation. You identified two issues to deal with right now and let me address those in order.

As a preliminary point let me just say that the RTC, as Your Honor noted, tried to get this case in its motion to intervene for a very specific, well-defined, narrow purpose.

THE COURT: In order to get out?

MR. COLLINS: No, get into the case with its motion to intervene.

THE COURT: You want to get in so you can get out?

MR. COLLINS: That's right. To pursue that —

THE COURT: Which is a strange — you know, that's sort of — it's taken me a while to get sort of at ease with the whole thing. You know, you want to get in so badly that you can file a motion so you can get out. Which is a — I mean, I'm sure there's a good reason for it, it's just taken me a while to figure what it is.

MR. COLLINS: There is a reason, Your Honor. In fact, this has been done a number of different times. And the reason is that if KPERS, as the RTC asserts, is asserting claims that belong to the RTC, the only way the RTC can preserve its right to those claims and to prevent any kind of res judicata effect being given to the adjudication of those claims, it has to come into the case to get them dismissed.

And that's the only — that was the defined and the only purpose on which the RTC sought to intervene. When it did that, it unfortunately got caught up in the jurisdictional concerns of the state court with KPERS and that's how this whole thing snowballed.

I think if the RTC would have been allowed into the case last May and filed its motions, we could have been into the case, accomplished the purpose and be out and we wouldn't have these problems we've got today.

THE COURT: But the feared result, the result most feared apparently by KPERS and by the state court would have occurred. You would have removed the case to some federal court, right?

MR. COLLINS: For the purpose of pursuing our motion to dismiss. Once that's accomplished, the motion is ruled on, the RTC no longer has a reason or standing to be in the case. That's why we intervened for a limited purpose. The RTC's out of the case, there's no longer basis for federal court jurisdiction and it goes back to state court.

THE COURT: Maybe.

MR. COLLINS: And we were up front with the state court and explained exactly what we wanted to do on that.

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